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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re TIFFANY A., a Person Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KIM BRUCE A. and LORRAINE S., Objectors and Appellants.	A094370 (Contra Costa County Super. Ct. No. J9702292)

Father Kim Bruce A. and mother Lorraine S. appeal from the orders terminating their parental rights with respect to their daughter Tiffany A. We affirm.

BACKGROUND

Tiffany was eight months old when she was scalded while being bathed by her mother in a kitchen sink. Three months later, in February of 1998, Lorraine admitted allegations of the petition filed by respondent Contra Costa County Department of Children and Family Services that she was a chronic drug user and that the child had suffered serious physical harm within the meaning of Welfare and Institutions Code section 300, subdivisions (b) and (g). Lorraine entered a residential rehab program while

Tiffany stayed with Joyce B., her maternal grandmother. Kim was in state prison at the time for a drug-related offense.

When Lorraine completed the rehab program, Tiffany was returned to her custody. Tiffany was put once more in her grandmother's care when Lorraine resumed using drugs. At the six-month review the juvenile court accepted respondent's recommendations that Tiffany would be continued as a dependent child, that Lorraine would continue to receive reunification services, and Joyce B. would continue to have custody.

By the time of the 12-month review, in February of 1999, Kim was still in prison, Tiffany was still with Joyce B., and Lorraine was in her third treatment program. Apart from her substance abuse problem, and the difficulties it caused, Lorraine was satisfying most of her reunification plan requirements; Kim, still in prison, was not. The juvenile court rejected the social worker's recommendation to terminate reunification services for Kim; the court ordered additional services and set an 18-month review.

At that review, conducted in September of 1999, the court heard that Lorraine was still having problems with drugs and alcohol, and was now failing most of her reunification plan goals. Since his release from prison in April of that year, Kim had fully satisfied only one of his reunification plan requirements. The social worker advised the court that because both parents "have both received eighteen months of Family Reunification services, and have not made significant improvement in their ability to parent their daughter, it is the recommendation of Social Services that the Court schedule a 366.26 hearing to address the most appropriate plan of adoption, guardianship, or long-term foster care for Tiffany." The juvenile court did not accept this recommendation, but it did terminate further reunification services and set a permanency planning review.

By the time that review occurred, on May 25, 2000, both parents had filed modification petitions pursuant to Welfare and Institutions Code section 388 asking for custody of Tiffany and that a family maintenance plan be established. The court was advised by respondent that notwithstanding an earlier (and second) recommendation "that a 366.26 hearing be set . . . , we have reconsidered our position and believe it is now time

for Tiffany to return to her parents' care" with an appropriate family maintenance plan. The court accepted these recommendations and ordered Tiffany returned to her parents' custody.

Six days later a search of their house revealed amounts of methamphetamine in the house and on Kim's person. Respondent filed a supplemental petition based on this event. Tiffany was detained and returned to the custody of Joyce B. At the conclusion of a contested hearing (at which Kim did not appear because he had been returned to state prison), the juvenile court sustained the petition and, following respondent's third recommendation to this effect, ordered that a hearing be scheduled to terminate parental rights in accordance with Welfare and Institutions Code section 366.26.

After the termination hearing had been scheduled, Lorraine filed another modification petition. She stated that she had been "released from custody and is living in a residential substance abuse treatment program"; she was asking for modification of the order terminating the provision of reunification services to her.

Lorraine's modification petition was heard together with respondent's petition to terminate parental rights in February of 2001. Kim, still in prison, waived his right to appear at the hearing, but he was represented by counsel. The only witnesses were Lorraine and her stepfather, Richard B. At the conclusion of the hearing the juvenile court ruled as follows:

"The first issue is the 388 petition, and I'm going to deny that petition. I do not believe that the evidence produced has shown that either circumstances have significantly changed or that it would be in the best interest of the child for the court to change its prior order. . . .

"The result with regard to the .26 hearing: This is not an easy case, but it's clear to me that by clear and convincing evidence that the child's adoptable, and there's no question in my mind as to that.

"And then it remains to be shown whether or not termination of parental rights would be detrimental to the child, and the parties seeking that bears the burden of proof. And there are four statutory circumstances only[] one of which has been alluded [to] here

today, and that has to do with the relationship of the child with the parents. There is absolutely no evidence that father has [a] parental relationship with the child, at least none before me to even raise it to the level being discussed.

"With regard to mother's relationship, the evidence before me shows that there is a significant emotional relationship between the child and mother, but I believe based on the cases I've had shown to me, not the parental relationship that's required to find the exception of the statute. Accordingly, . . . I'll follow the recommendations of the Department and make the following orders: [¶] . . . [¶]

"I find by clear and convincing evidence that the child will be adopted. . . . [¶] . . . [¶]

"I find that the child's placement is appropriate and that the permanent plan of adoption is appropriate for the child."

REVIEW

The statutory "exception" cited by the juvenile court provides in pertinent part: "If the court determines, based on the . . . relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption . . . unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (A) The parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Welf. & Inst. Code, § 366.26, subd. (c)(1).)

Both Kim and Lorraine contend that, in considering this exception, the juvenile court erred by following the test first established in 1994: "In the context of the dependency scheme prescribed by the Legislature, we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing

the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The parents contend that this formulation is "incorrect" because it employs the concept of a child being "greatly harmed," while the statutory standard is clearly stated to be "detriment" to a child if natural parental rights are terminated. If the parents are attacking the juvenile court for following the law established by the Court of Appeal, they misperceive the scope of the trial court's scope of independence; the juvenile court was required to follow that law. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) If the parents are asking this court to disagree with the *Autumn H.* formulation, we must decline. Division Three of this district recently concluded that "*Autumn H.* has been widely followed by the Courts of Appeal, and . . . [is] consistent with the statutory scheme and its interpretation by our Supreme Court." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347.) The parents' statutory construction argument has not been accepted by any appellate court. This court will not be the first.

Kim contends that the juvenile court erred in terminating his parental rights because he satisfied the statutory exception in that he visited Tiffany as often as his circumstances allowed. The juvenile court was unusually emphatic on this point, i.e., "There is absolutely no evidence that father has [a] parental relationship with the child, at least none before me to even raise it to the level being discussed." It is undisputed that Kim visited Tiffany regularly during the period following his release from prison in April 1999 and his arrest in May 2000. It also appears that following his last arrest Kim has had no contact with his daughter. Tiffany was almost four years old at the time of the termination. Kim visited her for a bit more than a quarter of that time, and then only when she was living with her grandparents. Tiffany's links to Kim appear to be tenuous; Lorraine testified that when Tiffany recently visited her in jail "she asks where's daddy, and that's as far as that goes." We do not believe the juvenile court erred in treating this history as inadequate to satisfy the statutory standard that a natural parent "maintained

regular visitation and contact with the child." There is nothing in the social worker's final report showing that the other part of the statutory test—that Tiffany "would benefit from continuing the relationship"—was satisfied either. We also note that the statutory test is conjunctive, meaning that Kim had to satisfy both parts. The record before us constitutes a basis for the juvenile court concluding that he satisfied neither.

The termination of Lorraine's parental rights presented a closer question—for the juvenile court. Without question, as she testified at the termination hearing, Lorraine earnestly desires to retain her status as Tiffany's mother and has made repeated efforts to achieve that goal by conquering her addiction. Lorraine testified as to the extent of her addiction at the hearing: "[Y]ou've got to understand, I wasn't just doing drugs overnight. I was an alcoholic and doing drugs for over 20 something years." Her latest effort, which was not completed at the time of the hearing, could be treated by the juvenile court as insufficient to overcome her extensive history of substance abuse. (See *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423-424.) And it could not have escaped the court's attention that Tiffany was last in her parents' care for a mere six days before she was again put at risk by her parents' drug-related problems.

Although the juvenile court found that "there is a significant emotional relationship between the child and mother," it did not find that this was "the parental relationship that's required to find the exception of the statute." The social worker noted the rocky and sporadic history of Lorraine's recent visitation: "During the period between May, 2000 and September, 2000, the mother requested one visit with Tiffany. The maternal grandmother and step-grandfather facilitated a visit, which they described as being very emotional and upsetting for Tiffany. . . . [¶] . . . [¶] During the last three months, the . . . mother requested and arranged for the maternal grandmother and step-grandfather to bring Tiffany for visits at the West County Detention Facility. The maternal grandmother and step-grandfather were honoring the mother's weekly requests for visits. However, in December, 2000, they decreased the visits to twice a month as Tiffany was having difficulty after the visits. Reportedly, Tiffany's behavior both at school and at home became increasingly more difficult after visits. She was unable to

follow directions and stay focused. These behaviors would last almost the entire week between visits. Children and Family Services immediately provided a therapy referral for Tiffany." Tiffany's grandparents decided that because her need for stability was becoming so important, and her distress caused by the visits was only getting worse, they had decided that it would be better if Tiffany had no contact with her parents for a number of years. The social worker further noted that "Tiffany has spent most of her life in her maternal grandmother and step-grandfather's home. They have been and will continue to provide Tiffany with the stability and nurturing she deserves." "She has established healthy attachments and a genuine bond with them."

As previously shown, the legal standard is that the juvenile court "balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H., supra,* 27 Cal.App.4th 567, 575.) Based on the foregoing, the juvenile court would have a basis for concluding, however painfully, that 18 months of reunification services had not halted Lorraine's addiction, that during that time Tiffany had formed a new and stable relationship with Joyce and Richard B., and that the balance was against the insecurity of Lorraine's present position. We will not overturn the court's ultimate decision to terminate Lorraine's parental rights.

The parents next contend that there is insufficient evidence to support the finding that Tiffany was adoptable. As the parents frame the issue, "the evidence was not clear and convincing that it was likely that Tiffany would be adopted because her adoptability was based on her grandparents' willingness to adopt and the evidence was insufficient that they were suitable prospective adoptive parents." The social worker advised the court that "The maternal grandmother and step-grandfather have demonstrated their commitment to adopting Tiffany. Children and Family Services recommends adoption as the most appropriate permanent plan for Tiffany. The prospective adoptive family has an

approved homestudy on file. Based on the reasons above, Tiffany is an adoptable child." The court was also told: "The prospective adoptive parents live in a three-bedroom home with a loft in a family oriented neighborhood in Contra Costa County. Tiffany has a large play space with plenty of age appropriate toys. The prospective adoptive mother's seventy-year-old mother lives in the home. She has her own bedroom and bathroom. She enjoys playing with Tiffany and is very pleased that she is part of the household. In addition, there are a host of supportive extended family members available for the prospective adoptive parents. [¶] . . . Their background checks reveal no criminal or child abuse history. Their Department of Motor Vehicles records were clear as well. The prospective adoptive father states that Tiffany brings a special quality to their lives. Tiffany is very happy and adjusted living with her maternal grandparents and great-grandmother." The fact that Tiffany's grandparents were ready and willing to adopt her, and the additional fact that respondent approved that goal, implicitly demonstrate that Tiffany was adoptable. (E.g., *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153-1154; *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.)

The parents' final contention is that the adoption assessment did not adequately assess the suitability of the prospective adoptive parents. This point could be treated as waived because it was not raised in the juvenile court. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.) If the parents had preserved the issue for appeal, they would not prevail because the information set forth in the preceding paragraph appears to more than meet the statutory requirements for the assessment. (See Welf. & Inst. Code, § 361.5, subd. (g).)

The orders terminating parental rights are affirmed.

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Kay, J.

We concur:

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Reardon, Acting P.J.

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Sepulveda, J.